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725388—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 699

J. W. SWENT AND URSULA L. SWENT, HUSBAND AND WIFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 15–23) is reported in 5 T. C. 33. The opinion of the Circuit Court of Appeals (R. 44–50) is reported in 155 F. 2d 513.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 8, 1946. (R. 50.) Rehearing was denied on June 18, 1946. (R. 63.) Time within which to file petition for certiorari was extended to and including November 16, 1946. (R. 64.) Petition for a writ of certiorari was

filed on November 16, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Were the taxpayers bona fide nonresidents of the United States "for more than six months during the taxable year" 1940 and entitled under Section 116 (a) of the Internal Revenue Code to an exemption for salary received during that year?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 116. EXCLUSIONS FROM GROSS INCOME
>
> In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:
>
> (a) *Earned Income from Sources Without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to

or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(26 U. S. C. 1940 ed., Sec. 116.)

STATEMENT

The facts as found by the Tax Court were as follows:

The taxpayers are husband and wife, native citizens of the United States, and were born in the State of California. They filed their separate income tax returns for the taxable year 1940, on the community property basis, with the Collector of Internal Revenue at Baltimore, Maryland. Their address as stated in their returns was Tayoltita, Durango, Mexico. Prior to 1935 the taxpayers filed their returns with the Sorting Section, Washington, D. C., and therein designated the same address. (R. 16.)

The husband, James W. Swent, first went to Mexico in September 1915, and was employed as an engineer. He married his present wife in Mexico where they remained. In March 1918, he was employed as a geologist by the San Luis Mining Company, a company engaged in mining gold and silver, and moved to Tayoltita. He became assistant manager of the company and about 1920 became the manager, a position which he has held ever since. He and his family have resided in Tayoltita since 1918. (R. 16.)

Tayoltita is a primitive mining town with about 1,500 inhabitants. It has no hotels or residences suitable or available for rent. The taxpayers and their family lived in an adobe house belonging to the company. (R. 16.)

Both taxpayers have suffered from the climatic conditions in Tayoltita. The husband had low blood pressure and his wife was anemic. Practically all of their visits to the United States in recent years have been on account of their health. (R. 16–17.)

The Mexican Government requires the registration of its residents as a prerequisite to their entering a gainful occupation. In so registering, the husband declared himself to be a resident of Tayoltita, Durango. His passports to the United States also stated that his place of residence was that village. He gave his address in the United States as 485 California Street, San Francisco, a business office. (R. 17.)

The taxpayers have two sons, age 27 and 22. Both were born in Oakland, California. They were sent to the United States for preparatory school and college training. The older son is now in the United States Navy. (R. 16.)

In 1940 the husband received an annual salary of $25,000 from the San Luis Company. Approximately one-half of this amount was regularly placed to his credit on the company's books in Mexico and the other half was deposited to his

credit in a San Francisco bank. He drew from his account in Mexico as he needed funds. During 1940 his salary from the San Luis Company was continued undiminished for any deduction for time spent out of Mexico. (R. 17.)

During the tax year 1940 the petitioners each spent a total of 241 days, comprising four visits, in the United States. Mrs. Swent always accompanied her husband on his trips to this country. In each of the years 1939, 1942, and 1943 they were in the United States over six months. While in San Francisco, Mr. Swent rented a furnished apartment, on a month-to-month basis, in an apartment house at 2222 Hyde Street. On his various trips he did not occupy the same apartment. The apartment was also used as headquarters for the taxpayers' sons while attending school in California. (R. 17.)

In 1940 Mr. Swent served as a consultant in litigation involving apex rights on a mine in Idaho. Intermittently he devoted several months during the period of a year and a half to such work, for which he received a fee of $10,000 in that year. He also was employed for about six months in 1940 as an expert in a depletion case in New Mexico. He received $4,000 for such services. He included both sums in his income tax return for 1940. The San Luis Company had no connection with either employment. (R. 17–18.)

The domicile of origin and the last domicile of

each of taxpayers prior to their going to Mexico was the State of California, and the community property law of the State of Durango, Republic of Mexico, in which the taxpayers have resided, is substantially the same as the community property law of the State of California. (R. 18.)

The Civil Code of California, Section 156, provides that the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. (R. 18.)

Mr. Swent is still manager of the San Luis Company and expects to continue his activities as such. He intends to retain his residence in Tayoltita. He is also president of a manganese company which has just completed a mill in Lower California. He is a director of the International Bank in Mexico City. (R. 18.)

The $25,000 salary received by Mr. Swent from the San Luis Company in 1940 was earned income from a source without the United States and would have constituted earned income as defined in Section 25 (a), Internal Revenue Code, if it had been received from a source within the United States. (R. 18.)

The Tax Court concluded that the taxpayers were bona fide nonresidents of the United States during the year 1940 (R. 18) and that the salary received by them was exempt from the federal income tax by virtue of the provisions of Section 116 (a) of the Internal Revenue Code. Decision

was entered for the taxpayers. (R. 23–24.) The Circuit Court of Appeals reversed.

ARGUMENT

This case presents no conflict of decisions. It is in complete accord with the only other circuit court of appeals decision on the question. It was correctly decided below and calls for no further review. The question is a narrow one and applicable to very few taxpayers. Moreover, the statute has been amended so that the question is not one of present importance.

Section 116 (a), here involved, exempts income from taxation where it has been earned from sources without the United States by one who is "a bona fide nonresident of the United States for more than six months during the taxable year." Thus, the statute establishes an arbitrary period of six months as a minimum requirement of nonresidence. The undisputed findings in this case show that each of the taxpayers was present 241 days in the United States during the taxable year. (R. 17.) The consistent administrative interpretation of the statute and its legislative history, discussed in the opinion below at R. 47–48, make clear that actual presence in the United States for more than six months during the taxable year is sufficient, as a matter of law, to deprive a taxpayer of the exemption. The only other decision by a circuit court of appeals on this issue is squarely in accord. In *Commissioner*

v. *Fiske's Estate,* 128 F. 2d 487, 490 (C. C. A. 7), certiorari denied, 317 U. S. 635, the court approved the administrative construction that the statute applies only to a citizen who was "actually outside of the United States for more than six months during the taxable year."

This case merely involves the construction of statutory language from which the Tax Court had drawn the generalizing principle that a taxpayer may be present within the United States for more than six months during the taxable year and yet qualify for the statutory exemption. The reversal of the Tax Court in this respect represents no departure from *Dobson* v. *Commissioner,* 320 U. S. 489, on which petitioner so strongly rests this petition.

There was no need to resolve disputed questions of fact nor to draw inferences of fact from basic findings. As in *Trust of Bingham* v. *Commissioner,* 325 U. S. 365, and *Commissioner* v. *Wilcox,* 327 U. S. 404, the Tax Court's determination of the meaning of statutory words was here properly re-examined as a matter of law. Particularly is it important that there be such review where the Tax Court overturns an established administrative interpretation of the statute. See *Commissioner* v. *Scottish American Co.,* 323 U. S. 119, 123.

The statute which governs the case was amended by Section 148 of the Revenue Act of 1942, c.

619, 56 Stat. 798, and now grants the exemption only to one who "is a bona fide *resident* of a foreign country or countries during the *entire* taxable year." [Italics supplied.] The petitioner does not refer to any pending cases involving other taxpayers for years prior to 1942 and we are aware of none in which this question is presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946